IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 26, 2006 Session

WORLD RELIEF CORPORATION OF THE NATIONAL ASSOCIATION OF EVANGELICALS v. ANDARGIE MESSAY ET AL.

Appeal from the Chancery Court for Davidson County
No. 04-3109-III Ellen Hobbs Lyle, Chancellor

No. M2005-01533-COA-R3-CV - Filed on July 26, 2007

This appeal involves the effect that ambiguity regarding the status of legal representation can have on a default judgment. After the operator of an Ethiopian restaurant defaulted on a promissory note, the lender filed suit in the Chancery Court for Davidson County against the restaurateur and his son. The restaurateur and his son talked to the same lawyer and believed that he had agreed to represent them. However, the lender later obtained a default judgment against the restaurateur and his son because no answer was ever filed on their behalf. The restaurateur and his son then retained new lawyers to file Tenn. R. Civ. P. 60 motions to set aside the default judgment. The restaurateur later withdrew his motion. The son, in support of his motion, prepared and submitted affidavits stating that he had relied on his lawyer to present his meritorious defense to the lender's claims. The lawyer also filed an affidavit asserting that he had never represented the son in this proceeding. The trial court declined to set aside the default judgment against the son on the ground that the actions or inactions of his lawyer were attributable to him. The son appealed. We have determined that the record is insufficient to determine whether or not the lawyer was representing the son or whether the son reasonably believed that the lawyer was representing him. We have also concluded that the trial court erred by denying the son's Tenn. R. Civ. P. 60 motion in light of the materially incomplete record.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Nick Perenich, Nashville, Tennessee, for the appellant, Nebiu Messay.

Stephen C. Knight and W. Scott Rose, Nashville, Tennessee, for the appellee, World Relief Corporation of the National Association of Evangelicals.

OPINION

I.

Andargie Messay[1] operated the Addis Ababa Restaurant in rented space on Thompson Lane in Nashville. The restaurant was struggling, and on October 3, 2000, he borrowed $20,000 from the World Relief Corporation of the National Association of Evangelicals ("World Relief"). According to the loan documents,[2] the term of the loan was three years, the interest rate was 12%, and the loan was secured by Andargie Messay's 1989 Lincoln Continental and a Uniform Commercial Code national financing statement ("UCC 1") on the restaurant up to $20,000, including all equipment, furniture, and fixtures.

Andargie Messay made the monthly loan payments of $665 for the next four months. He then borrowed an additional $5,000 from World Relief. On April 1, 2001, the parties executed new loan documents superseding the prior ones. The new loan documents increased the loan amount and the UCC 1 lien from $20,000 to $25,000,[3] removed Andargie Messay's car as security for the loan, and extended the repayment schedule from three years to four. The monthly payment remained $665. As in the prior loan documents, Andargie Messay agreed to pay the costs of collection in the event he defaulted on the loan, as well as reasonable attorney's fees and any court costs.

Andargie Messay continued to make the monthly loan payments for the next three months. However, he made no payments in July, August, and October of 2001 and made only partial payments in September and November. In December 2001, Andargie Messay closed the Addis Ababa Restaurant, abandoned the premises, and ceased making all but token payments on the loan. At some point, Andargie Messay's son, Nebiu Messay, leased the Thompson Lane location from the building's landlord and opened the Lalibela Restaurant.[4]

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[1]To avoid confusion, Andargie Messay and his son, Nebiu Messay, will be referred to by their full names.

[2]The loan documents consisted of a written loan agreement and a promissory note. The promissory note erroneously stated that the term of the loan was two years rather than three.

[3]The only UCC 1 contained in the record on appeal is the one filed with the Tennessee Secretary of State on November 8, 2000. *See* Tenn. Code Ann. § 47-9-521 (2001). According to this document, the lien amount was $15,000, not $20,000 or $25,000 as stated in the loan documents. We need not resolve the discrepancy in order to dispose of this appeal. Throughout this opinion, we will refer to the lien amounts listed in the parties' loan documents rather than the amount listed in the UCC 1 itself. In doing so, we do not intend to foreclose any party from arguing at a later date that the UCC 1 lien was at all times $15,000.

[4]Surprisingly, the record on appeal reflects neither the name of the Messays' landlord nor the date on which Nebiu Messay began operating the Lalibela Restaurant at the Thompson Lane location.

Like the Addis Ababa Restaurant before it, the Lalibela Restaurant served Ethiopian cuisine.[5] Nebiu Messay used the existing equipment and fixtures to operate the new restaurant. According to Nebiu Messay, Andargie Messay had no involvement in the Lalibela Restaurant, and he had no involvement in the Addis Ababa Restaurant run by his father. Nebiu Messay's name does not appear on any of the loan documents executed by Andargie Messay and World Relief or on the UCC 1 World Relief filed with the Tennessee Secretary of State on November 8, 2000.

On October 29, 2004, World Relief filed a complaint against Andargie Messay and Nebiu Messay in the Chancery Court for Davidson County for default on a promissory note and as an action to recover personal property or, in the alternative, detinue.[6] The complaint alleged the Messays had been in business together all along and that the Lalibela Restaurant was simply the Addis Ababa Restaurant under a new name. World Relief requested compensatory damages of $31,924.97, prejudgment and post-judgment interest, attorney's fees and other costs of collection, and a writ of possession for all the equipment and furnishings at the Lalibela Restaurant. The following month, the Messays filed a handwritten motion in the trial court requesting additional time to find a lawyer and to "file our defence [sic]." The trial court did not respond to the Messays' motion.

On February 9, 2005, World Relief filed a motion for default judgment. According to the motion, on January 10, 2005, World Relief's lawyer had received a call from Paul Walwyn[7] "who advised that he had been retained to represent Defendants."[8] Paul Walwyn requested additional time to prepare the Messays' answer, and the lawyers mutually agreed that the answer would be due January 24, 2005. However, no answer was filed, and Paul Walwyn did not contact World Relief's counsel again. On March 14, 2005, the trial court granted World Relief's motion and entered a default judgment against the Messays.

Two weeks later, on March 29, 2005, Marc Walwyn, Paul Walwyn's brother and law partner, filed a motion to set aside the default judgment on behalf of Andargie Messay only. The motion claimed he abandoned the Addis Ababa Restaurant in December 2001 and that he had no part in the operation of the Lalibela Restaurant at the same location. Marc Walwyn served the motion not only on World Relief's lawyer and Nebiu Messay, but on his own brother, Paul Walwyn, as well.

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[5]Nebiu Messay immigrated to the United States from Ethiopia and became a United States citizen in approximately 1990. The record is unclear regarding when he became a resident, and hence a citizen, of Tennessee. *See* U.S. Const. Amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.")

[6]Tenn. Code Ann. § 29-30-201 (2000) provides as follows: "Where the action [to recover personal property] is to recover specific personal property, if the party seeks to recover the possession only at the end of the suit, the party may bring detinue."

[7]To avoid confusion Paul Walwyn and his brother, Marc Walwyn, will be referred to by their full names.

[8]Billing records submitted in support of World Relief's request for attorney's fees confirm that World Relief's counsel spoke with Paul Walwyn on January 10, 2005.

On April 12, 2005, Nebiu Messay, with the assistance of a new lawyer, filed a belated answer to World Relief's complaint along with a motion to set aside the default judgment. In his accompanying affidavit, Nebiu Messay denied taking over the Addis Ababa Restaurant from his father. Nebiu Messay claimed he leased the building from the owner after his father abandoned the premises in December 2001 and that his father had no part in the operation of the restaurant. Nebiu Messay swore he had no relationship with World Relief and claimed he had never even heard of the organization until the filing of the lawsuit.

Nebiu Messay also claimed he and his father met with Paul Walwyn, an acquaintance of his father, at Paul Walwyn's office following the filing of the lawsuit. He asserted that after discussing the case with Paul Walwyn, he believed Paul Walwyn was representing him in the lawsuit and would file all necessary papers on his behalf. He claimed he did not realize anything was wrong until he received the notice of entry of the default judgment. Nebiu Messay stated that, at that point, he immediately hired a new lawyer to represent him, which resulted in the filing of the answer to the complaint and the motion to set aside the default judgment.

World Relief raised two arguments in response to Nebiu Messay's motion to set aside the default judgment against him. First, World Relief claimed the Nebiu Messay was essentially accusing Paul Walwyn of legal malpractice and urged the trial court not to accept such allegations without first conducting an evidentiary hearing. Second, World Relief asserted that even if Nebiu Messay's charges against Paul Walwyn were true, they did not justify setting aside the default judgment. Notably, World Relief did not contend that Nebiu Messay's late-filed answer failed to assert a meritorious defense to the complaint or that it had been prejudiced by the delay in the filing of the answer.

The trial court set a hearing on both motions to set aside the default judgment for April 29, 2005. Nine days before the hearing, Andargie Messay withdrew his motion to set aside the default judgment against him. The hearing proceeded as scheduled on Nebiu Messay's motion alone. Although World Relief subpoenaed Paul Walwyn to appear at the hearing as a witness, he declined to appear. Instead, with the trial court's permission, Paul Walwyn submitted a post-hearing affidavit recounting his version of the relevant events. The trial court did not receive any evidence at the April 29, 2005 hearing.

In his affidavit, Paul Walwyn assured the trial court that he had never been Andargie Messay's or Nebiu Messay's lawyer. He admitted meeting with the Messays in his office on January 6, 2005, reviewing documents related to the litigation with them, and having them fill out a document prominently labeled "Client Information Form." According to Paul Walwyn, he advised the Messays of their options, told them they would have to be represented by separate counsel in the lawsuit because it appeared their interests were adverse, and informed them that he would require a deposit and signed retainer agreement before undertaking representation of either of them. Paul Walwyn claimed he told the Messays that time was of the essence and warned them of the risk and consequences of a default judgment.

Paul Walwyn admitted agreeing to call the trial court clerk's office on the Messays' behalf to determine the status of their handwritten motion for additional time. He conceded agreeing to call opposing counsel as well to request extra time for the filing of the answer. According to Paul Walwyn, he made it clear to the Messays that he was doing these things solely as a courtesy to them and that any additional involvement in the matter was contingent on one of them paying him a deposit and signing a retainer agreement. Paul Walwyn stated that, after speaking with the clerk's office and opposing counsel, he called Andargie Messay, but not Nebiu Messay, to inform him of the results of those conversations. He also acknowledged referring Andargie Messay to his brother, Marc Walwyn, for representation following the entry of the default judgment. He flatly denied ever telling the Messays that he would "take care of this lawsuit" for them and claimed he did "not know how Nabiu [sic] could have thought that I was representing him and would file any necessary papers and/or answers on his behalf."

On May 11, 2005, Nebiu Messay filed an affidavit responding to Paul Walwyn's affidavit. He denied Paul Walwyn's claim that he told the Messays they would need separate representation and that he would not agree to represent either of them without a deposit and a signed retainer agreement. Nebiu Messay pointed out that after the meeting, the papers he received from World Relief's attorney all listed Paul Walwyn on the certificate of service. Moreover, he noted that Paul Walwyn never contacted him to inform him that he needed to retain another lawyer. According to Nebiu Messay, his father never told him about the alleged later conversation between Paul Walwyn and his father. Nebiu Messay insisted he believed Paul Walwyn was representing him in the lawsuit and had agreed to file all necessary papers on his behalf.

Nebiu Messay also provided further details on his relationship with his father. He claimed his contact with his father was limited to once or twice a month and denied living or doing business with his father. He denied any responsibility for his father's debt to World Relief and swore he did not conspire with his father to get out of paying the World Relief note. Nebiu Messay claimed his father was solely responsible for any debt to World Relief and accused World Relief of making a mistake in loaning money to a person with bad credit and then trying to force his hardworking son with good credit to assume the responsibility for the debt.

On May 25, 2005, the trial court issued a two-page order denying Nebiu Messay's motion to set aside the default judgment. The trial court held that a claim of negligence on the part of a lawyer is insufficient as a matter of law to set aside a default judgment under Tenn. R. Civ. P. 60.02(1) because the lawyer's negligence is conclusively attributed to the client. The court opined that in such cases, the client's recourse is a legal malpractice suit against the lawyer. The trial court also held against Nebiu Messay on the facts, concluding that Paul Walwyn's affidavit "counterbalances if not refutes" Nebiu Messay's two affidavits and that Mr. Messay therefore failed to prove by a preponderance of the evidence that Paul Walwyn was representing him in this matter. Nebiu Messay appealed.

II.

Tenn. R. Civ. P. 55.02 provides that a trial court may, for good cause shown, set aside a default judgment in accordance with Rule 60.02. Tenn. R. Civ. P. 60.02(1) states that "[o]n motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for . . . mistake, inadvertence, surprise or excusable neglect." Because default judgments run counter to the judicial system's general preference for disposing of cases on the merits, courts construe Tenn. R. Civ. P. 60.02 motions liberally in the context of a default judgment. *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003); *Noah v. Noah*, No. E2005-02511-COA-R3-CV, 2006 WL 1679607, at *4 (Tenn. Ct. App. June 19, 2006) (No Tenn. R. App. P. 11 application filed).

As the Tennessee Supreme Court has explained, "[t]here is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits." *Tenn. Dep't of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985) (quoting 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2857, at 160 (1973)). Accordingly, a motion to vacate a default judgment should be granted whenever "there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits." *Henry v. Goins*, 104 S.W.3d at 481; *accord Bowers v. Gutterguard of Tenn., Inc.*, No. M2002-02877-COA-R3-CV, 2003 WL 22994302, at *6 (Tenn. Ct. App. Dec. 17, 2003) (No Tenn. R. App. P. 11 application filed).

We review a trial court's decision to grant or deny a motion to set aside a default judgment for an abuse of discretion. *Henry v. Goins*, 104 S.W.3d at 479; *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). The abuse of discretion standard of review does not permit us to merely substitute our judgment for that of the trial court. *Henry v. Goins*, 104 S.W.3d at 479; *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). Rather, we will find an abuse of discretion only where the trial court has applied an incorrect legal standard, reached an illogical conclusion, relied on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party. *Moore v. Metro. Bd. of Zoning Appeals*, 205 S.W.3d 429, 435 (Tenn. Ct. App. 2006); *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 35 (Tenn. Ct. App. 2002).

III.

Nebiu Messay contends the trial court erred by holding that a party can never show "excusable neglect" under Tenn. R. Civ. P. 60.02(1) based on his or her lawyer's negligence because the lawyer's negligence is conclusively attributed to the client. We agree. The doctrine of lawyer-client attribution is not as unyielding as the trial court supposed, and the previous categorical exclusion of lawyer negligence from the scope of "excusable neglect" under Tenn. R. Civ. P. 60.02(1) is no longer viable. Moreover, the trial court failed to address the additional question whether Nebiu Messay reasonably believed that Paul Walwyn was representing him, even if he was not.

A.

As a general rule, the acts and omissions of a lawyer undertaken during the course and in the scope of his or her representation of a particular client are attributed to that client. *House v. State*, 911 S.W.2d 705, 714 (Tenn. 1995); *Madu v. Madu*, No. M1999-02302-COA-R3-CV, 2000 WL 1586461, at *5 (Tenn. Ct. App. Oct. 25, 2000) (No Tenn. R. App. P. 11 application filed). This is because the lawyer is the agent of the client. *Link v. Wabash R.R.*, 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1390 (1962); *Madu v. Madu*, 2000 WL 1586461, at *5. The doctrine of agent-principal attribution holds a special place in the context of the lawyer-client relationship not only because the most basic rights of individuals are often at issue, but also because our adversarial system of justice would quickly grind to a halt without it. *See Link v. Wabash R.R.*, 370 U.S. at 634 & n.10, 82 S. Ct. at 1390 & n.10.

Critical to any agency analysis is a determination regarding whether an agency relationship was actually formed. *Rural Educ. Ass'n v. Bush*, 42 Tenn. App. 34, 43, 298 S.W.2d 761, 766 (1957). In this case, the evidence on this issue consists solely of the affidavit testimony of Nebiu Messay and Paul Walwyn. It is difficult, and perhaps impossible, to reconcile their conflicting accounts of what occurred at the January 2005 meeting in Paul Walwyn's office. Three scenarios are possible: either (1) Nebiu Messay's affidavits contain incorrect factual statements; (2) Paul Walwyn's affidavit contains incorrect factual statements; or (3) the truth lies somewhere in between the imperfect recollections of Nebiu Messay and Paul Walwyn.

If the factual statements in Nebiu Messay's affidavits are incorrect, the case is at an end. No lawyer-client relationship was formed, and Nebiu Messay's neglect in failing to answer World Relief's complaint stands unexcused. However, as explained below, if the second or third scenario is closer to the truth, further analysis is required. We are at a loss to see how the trial court could have concluded from this sparse record that the first scenario was the most likely. There is nothing inherently more credible about a lawyer's affidavit than a non-lawyer's affidavit, and there is no other evidence in the record that tends to undermine Nebiu Messay's claims. To the contrary, the meager information contained in the record buttresses Nebiu Messay's claim that Paul Walwyn was representing him. After all, his account is corroborated by the statements and actions not only of opposing counsel, but also of Marc Walwyn, Paul Walwyn's own brother and law partner.

To be sure, an evidentiary hearing is not required in every case of dueling affidavits. For example, had the trial court determined the second or third scenario was what most likely happened here, we would be hard pressed to say the trial court's decision was based on a clearly erroneous assessment of the evidence. However, given the state and contents of this record, we conclude that the trial court erred when it accredited Paul Walwyn's affidavit without conducting an evidentiary hearing to sort out the disputed accounts of the January 2005 meeting. Accordingly, we have concluded that the case must be remanded for further proceedings because the record fails to provide an adequate basis for reliably determining the nature of the relationship between Nebiu Messay and Paul Walwyn. Tenn. Code Ann. § 27-3-128 (2000).

B.

World Relief claims, and the trial court held, that even if Nebiu Messay's claims are true, Paul Walwyn's negligent failure to answer the complaint does not constitute "excusable neglect" under Tenn. R. Civ. P. 60.02(1). World Relief bases its argument on repeated statements in older Tennessee cases to the effect that "mere negligence" or "carelessness" of an attorney does not qualify as "excusable neglect" sufficient to set aside a default judgment under Tenn. R. Civ. P. 60.02(1). *See, e.g.*, *Food Lion, Inc. v. Washington County Beer Bd.*, 700 S.W.2d 893, 896 (Tenn. 1985). The reliance by World Relief and the trial court on these older cases is misplaced.

In 2003, the Tennessee Supreme Court adopted a new test for evaluating motions to set aside a default judgment on the grounds specified in Tenn. R. Civ. P. 60.02(1). *Henry v. Goins*, 104 S.W.3d 475 (Tenn. 2003). The court explained that in such cases, the following three factors must be considered: "(1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted." *Henry v. Goins*, 104 S.W.3d at 481. The willfulness standard is incompatible with the former categorical exclusion for mere negligence or carelessness of an attorney.[9] *Robb v. Norfolk & W. Ry. Co.*, 122 F.3d 354, 358-62 (7th Cir. 1997); *Stelco Holding Co. v. U.S.*, 44 Fed. Cl. 703, 715-16 (Fed. Cl. 1999). Accordingly, we conclude that Tennessee law, following the arc of federal case law[10] under the almost identically worded Fed. R. Civ. P. 60(b)(1), no longer categorically excludes "mere

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[9]Tenn. R. Civ. P. 60.02(1) applies on its face to acts and omissions of both "a party" and "the party's legal representative." Prior to the United States Supreme Court decision in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993), in which the Court interpreted "inexcusable neglect" under Fed. R. Bankr. P. 9006(b)(1), and even to certain extent thereafter, the Federal Courts of Appeals were divided into liberal and narrow construction camps that diverged on the question of whether mere carelessness or negligence of an attorney could constitute a ground for "excusable neglect" under Fed. R. Civ. P. 60(b)(1). *See generally Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 358-60 (7th Cir. 1997); *Am. Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F. 3d at 60-61; Brett Warren Weathersbee, Note, *No More Excuses: Refusing to Condone Mere Carelessness or Negligence Under the "Excusable Neglect" Standard in Federal Rule of Civil Procedure 60(B)(1),* 50 Vand. L. Rev. 1619 (1997). The factors adopted by the Tennessee Supreme Court in *Henry v. Goins* were imported via *Tenn. Dep't. of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985) from the United States Court of Appeals for the Second Circuit's broader interpretation of "excusable neglect." *See e.g.*, *Davis v. Musler*, 713 F.2d 907, 915 (2d Cir.1983). This approach has been to find that negligence, a form of neglect, may be excusable and to employ wilfulness as a critical factor in distinguishing neglect that is excusable from that which is not. *Am. Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F. 3d 57, 59-62 (2d Cir. 1996). While the Tennessee courts are not bound in interpreting Tenn. R. Civ. P. 60.02(1) by the federal courts' interpretation of the similar language of Fed. R. Civ. P. 60(b)(1), the Tennessee Supreme Court in *Henry v. Goins* embraced the Second Circuit's factors, which in the application of the wilfulness approach allows ample room for negligence to constitute "excusable neglect."

[10]The federal courts have steadily moved towards an understanding of "excusable neglect" under Fed. R. Civ. P. 60(b)(1) that permits a finding of excusable neglect on motions to set aside default judgments despite negligence on the part of the defaulting party or the attorney thereof. *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000); *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d at 358-62; *Am. Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F. 3d at 61 & n. 2; *but see Sprint Spectrum, L.P. v. Genesis PCS Corp.*, 236 F.R.D. 530 (D. Kan. 2006).

negligence" or "carelessness" of an attorney from the scope of "excusable neglect" under Tenn. R. Civ. P. 60.02(1) with regard to setting aside default judgments.[11]

Our conclusion in this regard is bolstered by the Tennessee Supreme Court's recent decision in *Williams v. Baptist Mem'l. Hosp.*, 193 S.W.3d 545 (Tenn. 2006). There, the court expressly adopted the following analysis for "excusable neglect" under Tenn. R. Civ. P. 6.02(2) that the United States Supreme Court had set forth for analyzing claims of "excusable neglect" under Fed. R. Civ. P. 6(b)(2):

> A party's failure to meet a deadline may have causes ranging from forces beyond its control to forces within its control . . . . The former will almost always substantiate a claim of excusable neglect; the latter will not. However, neglect extends to more than just acts beyond a party's control and intentional acts. It encompasses simple, faultless omissions to act and, more commonly, *omissions caused by carelessness*.

Williams v. Baptist Mem. Hosp., 193 S.W.3d at 551 (quoting *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d at 567, in turn quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388, 113 S. Ct. 1489, 1495 (1993)) (internal quotation marks omitted and emphasis added). We see no reason to give the term a different meaning in Rule 60.02(1) than it has in Rule 6.02(2).

The trial court erred by holding that a lawyer's negligence can never constitute "excusable neglect" under Tenn. R. Civ. P. 60.02(1). Accordingly, if the trial court determines on remand that Paul Walwyn was Nebiu Messay's lawyer, the court must also decide whether his failure to file an answer on Mr. Messay's behalf was willful or merely negligent.

C.

The trial court ended its analysis after concluding that any negligence by Paul Walwyn was attributable to Nebiu Messay and that Nebiu Messay failed to prove by a preponderance of the evidence that Paul Walwyn was representing him. This was error. Even if Paul Walwyn was not Nebiu Messay's lawyer, the question remains whether Nebiu Messay reasonably, but mistakenly,

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[11] *See Bowers v. Gutterguard of Tenn., Inc.*, 2003 WL 22994302, at *4 ("This Court has held that negligence on the part of the moving party is precisely the type of error a Rule 60 motion is designed to relieve.") (internal quotation marks omitted) (quoting *Abbott v. Gateway*, No. M1999-00653-COA-R3-CV, 2000 WL 1038113, at *2 (Tenn. Ct. App. July 28, 2000) (No Tenn. R. App. P. 11 application filed), in turn quoting *Tenn. State Bank v. Lay*, 609 S.W.2d 525, 527 (Tenn. Ct. App. 1980)); *cf. State ex rel. Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 557, 567 (Tenn. Ct. App. 2001) ("[T]he excusable neglect concept [under Tenn. R. Civ. P. 6.02(2)] may also apply to situations in which failure to comply with a filing deadline is attributable to a filer's negligence."); *see also* Robert M. Schoenhaus, *"Excusable Neglect" Warranting Relief from Default Judgment*, *in* 24 Am. Jr. Proof of Facts 2d § 705, at 719 (1980) ("[A] party who exercises due diligence in selecting an attorney and in relying on the attorney's proficiency in handling a particular matter will not necessarily be responsible for the negligent acts of that attorney.").

believed he was. A reasonable but mistaken belief that one is represented by counsel is precisely the type of quandary the time-limited "escape valve" of Tenn. R. Civ. P. 60.02(1) was designed to address. *Henry v. Goins*, 104 S.W.3d at 482; *see Dotson v. Dotson*, No. M2002-02578-COA-R3-CV, 2004 WL 73269, at * 3 (Tenn. Ct. App. Jan. 16, 2004) (No Tenn. R. App. P. 11 application filed); *see also* 11 Charles A. Wright et al., *Federal Practice and Procedure* § 2858, at 267 (3rd ed. 2005) (noting that under the analogous Fed. R. Civ. P. 60(b)(1), "[j]udgments have been set aside when they were based on a misunderstanding about appearance and representation by counsel"). Accordingly, if the trial court determines on remand that Nebiu Messay was, in fact, not represented by Paul Walwyn, it must then determine whether Nebiu Messay nevertheless reasonably believed that Paul Walwyn was representing him. If the trial court determines that Nebiu Messay reasonably believed that Paul Walwyn was representing him, the relief under Tenn. R. Civ. P. 60.02(1) is plainly warranted.

IV.

We vacate the May 25, 2005 order denying Nebiu Messay's motion to set aside the default judgment and remand the case for further proceedings consistent with this opinion. We tax the costs of this appeal, in equal parts, to Nebiu Messay and his surety and to the World Relief Corporation of the National Association of Evangelicals for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.